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8 Judge JONES  
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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT SEATTLE

13 UNITED STATES OF AMERICA, ) NO. CR 09-402 RAJ  
14 Plaintiff, )  
15 v. ) DEFENDANT ASHMORE'S  
16 ) MEMORANDUM RE:  
17 MARK ASHMORE, ) GUIDELINE LOSS &  
18 Defendant ) RESTITUTION  
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27 MARK ASHMORE, Mark Ashmore, through counsel, Terrence  
Kellogg, submits the following memorandum concerning issues of calculation of  
the loss amount for purposes of guideline application and, as directed by the  
court, issues concerning the amount of restitution to be imposed at the time of  
sentencing in this matter.

**Introduction:**

The government cannot establish by a preponderance of the evidence the  
claimed guideline loss and restitution, for properties other than those set forth in  
the indictment or testified to at trial, resulted from criminal conduct of the counts

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2 of conviction. Other real estate transactions are beyond the scope of the  
3 conspiracy established at trial, unless the government proves by a  
4 preponderance of the evidence the essence of the conspiracy, wire fraud, was  
5 involved in each of the other transactions.

6       As ordered by the court the government has provided Ashmore with  
7 additional sentencing documents relative to the determination of the amount of  
8 loss and the amount of restitution, and to whom, the government is urging the  
9 court to require of Ashmore as part of the sentencing in this matter. The  
10 government has identified 62 separate properties, with one "removed", which  
11 constitute the basis for both the government's position concerning restitution and  
12 loss amount. The government's claimed amount of loss attributable to Ashmore  
13 for his involvement in the counts of conviction is approximately \$10.8 million.

14       The final probation presentence report [PSR], at ¶ 15, identified 40  
15 properties referred to by the government as constituting loss for guideline  
16 calculations that, by footnote reference in the final version of the PSR, became 80  
17 properties. At a later portion of the PSR, the justification for recommendation,  
18 the reference by probation is to a loss involving 80 properties. Probation, in  
19 addressing the defense objections to Ashmore's PSR as to concerns with both loss  
20 amount and restitution, deferred to the evidentiary hearing scheduled before the  
21 court. Accordingly, Ashmore in this memorandum will address only those  
22 properties identified by the government in its most recent, and final, documents,  
23 as reflected in the referenced government spreadsheet and the 62 properties  
24 referred to therein.

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3 **Calculation of Loss for Guideline Purposes:**

4 Properties the government contends are to be included within the  
5 guideline loss calculation for Ashmore are beyond the scope of relevant conduct  
6 for the conspiracy Ashmore was convicted of at trial in that the are properties  
7 separated in time (several of the transactions included by the government were  
8 purchased four and six years prior to the transactions presented at trial), were  
9 remote physically ( the Pahrump, Nevada properties are included by the  
10 government for loss although there has not been established any involvement by  
11 Ashmore in these transactions), were different in kind (the properties included in  
12 loss are some that were held four or six years prior to sale or transfer resulting in  
13 the loss calculation), had no actual or intended loss, or, most importantly, did not  
14 have as an element of the transaction a wire fraud nexus but merely involved  
15 Ashmore or others associated with Ashmore yet not part of the criminal conduct  
16 of the counts of conviction.

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18 At ¶ 26 of the final PSR probation accepted the government's loss  
19 calculation in the amount \$13,035,004.87 as loss to 69 properties. At ¶ 33 of the  
20 final PSR, in application of USSG § 2B 1.1, probation added an additional 20  
21 levels based upon loss in excess of \$7 million. It is Ashmore's position that actual  
22 loss, as reasonably found to have been established by the government at the time  
23 of sentencing, is less than \$2.5 million for all of the offenses of conviction  
24 together with relevant conduct for which Ashmore is responsible under the  
25 guideline application. Under USSG § 2B 1.1 a loss of more than \$1 million but  
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2 not more than \$2.5 million results in an increase of 16 levels in a defendant's  
3 offense level.

4 It is the defense position on behalf of Ashmore that, for guideline loss  
5 calculation purposes, the amount of loss for which Ashmore is to be held  
6 accountable would be the loss resulting from the three properties referred to as  
7 the subject of overt acts of count one of the indictment, the conspiracy count,  
8 which are the same three properties which were the subject of the three  
9 substantive counts of conviction for wire fraud. In addition, the defense would  
10 agree that the five properties testified to by witnesses for the government at the  
11 time of trial should be included within loss calculation as relevant conduct for  
12 which Ashmore is to be held responsible in the commission of the conspiracy  
13 count of conviction.

14 It is the defense position that the three properties referred to in the  
15 indictment, together with the additional five properties testified to at the time of  
16 trial as relevant conduct, result in a total loss **as calculated by the government** in  
17 the amount of \$2,037,698.

18 The defense does not agree with the government methodology utilized in  
19 determination of the amount of loss. More importantly, the defense objects to  
20 the government's inclusion of properties other than the properties identified in  
21 the indictment, as substantive counts and the subject of overt acts, together with  
22 the additional five properties constituting relevant conduct as testified to by  
23 government witnesses, with appropriate exhibits introduced, at the time of trial.

Simply stated, there is no causal relationship between Ashmore's counts of conviction conduct and the government's claim for loss for any properties other than the eight identified above. There is simply no nexus between Ashmore's counts of conviction conduct, including conduct for which he is responsible as jointly undertaking criminal conduct in furtherance of the conspiracy as set forth in the guideline and the losses or restitution claimed by the government.

In the absence of establishing false statements to lenders for the underlying purchase of properties there is no basis for including such properties as loss.

**Restitution:**

Of the three properties referred to in the in the indictment the government is seeking restitution as to one of them in the amount of \$135,547. Of the five properties additionally presented at the time of trial as relevant conduct to the conspiracy count the government again seeks restitution as to only one of those properties, in the amount of \$114,322. It is the defense position that the total restitution for which Mark Ashmore should be found responsible is \$249,869.

In *United States v. Gaytan*, 34 F. 3d 1010 (9th Cir. 2003) the court found "the general rule is that 'restitution in a criminal case may only compensate a victim for actual losses caused by the defendants criminal conduct.'" *United States v. Gamma Tech Indus., Inc.*, 265 F. 3d 917, 926 (9th Cir. 2001) (citing 18 USC § 3664 (a) and *United States v. Rodrigues*, 229 F. 3d 842, 845 (9th Cir. 2000)).

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2 Restitution is only proper if the losses directly resulted from the  
3 defendant's criminal conduct: a victim must be "directly harmed by a  
4 defendant's criminal conduct" *Gamma Tech Indus., Inc., supra*.

5 Pursuant to 18 USC § 3663A (f) (2) the court can order the manner and  
6 schedule for the payment of restitution in consideration of a defendant's financial  
7 resources, including property, earnings, and income, as well as the defendant's  
8 financial obligations. The court is authorized by statute to provide for nominal  
9 periodic payments in light of such considerations. See 18 USC § 3663A (f) (3) (B).  
10 Moreover, as referred to in § 3663A, 18 USC § 3572 (d) (1) provides for the court  
11 to order payment of restitution in installments.

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13 In light of Ashmore's financial consideration, particularly given the term  
14 of confinement, the court will impose as part of the sentence, the court is urged  
15 to require nominal periodic payments of restitution until such time as Ashmore  
16 is able to make more substantial contributions towards his restitution obligation.

17 **Conclusion:**

18 At the time of hearing as to restitution and loss the court will find the  
19 absence of proof by the government of wire fraud in the underlying original  
20 purchase obligations of various properties, other than as presented at trial,

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STIPULATION TO EXTEND  
PRETRIAL MPTIONS DUE DATE - 6

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1  
2 prevents including such losses for either guideline purposes or restitution.  
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4 DATED this 24th day of March, 2011.  
5  
6 s/ Terrence Kellogg  
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STIPULATION TO EXTEND  
PRETRIAL MPTIONS DUE DATE - 7

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3 CERTIFICATE OF SERVICE  
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6 Terrence Kellogg does hereby certify that on the 24th of March, 2011 he caused  
7 the document set forth above to be served on all counsel of record by filing the same with  
8 the Western District of Washington ECF system.  
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